No. 94-704

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF CHICAGO,
Petitioner,
v.
JAMES M. ALEX, *et al.*,
Respondents.

THE CITY OF CHICAGO,
Petitioner,
v.
MICHAEL M. MCKITTRICK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether ambulance and rescue service employees who are employed by an organized fire department fall within the partial exemption from the Fair Labor Standards Act overtime pay requirements, 29 U.S.C. § 207(k), for employees of a public agency engaged in "fire protection activities."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE *AMICI CURIAE*	1
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Alexander v. Kansas City, 1993 WL 393013 (D. Kan. Sept. 23, 1993) 2, 4
Bond v. City of Jackson, 939 F.2d 285 (5th Cir. 1991) 2
Burgess v. Catawba County, 805 F. Supp. 341 (W.D. N.C. 1992) 2
Justice v. Metropolitan Government, 4 F.3d 1387 (6th Cir. 1993) 2, 4
Littlefield v. Town of Old Orchard Beach, 780 F. Supp. 64 (D. Me. 1992) 2-3
Nalley v. Mayor and City Council of Baltimore, 796 F. Supp. 194 (D. Md. 1992) 2
Wouters v. Martin County, 9 F.3d 924 (11th Cir. 1993), cert. denied, 115 S. Ct. 65 (1994) 2, 4

STATUTES AND REGULATIONS

29 U.S.C. § 207(k) (1988) 2, 3, 5, 6
29 C.F.R. § 553.210 (1993) 2, 3, 4, 5
29 C.F.R. § 553.211 (1993) 2, 3, 4, 5
29 C.F.R. § 553.215 (1993) 2, 4, 5

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include municipal, county, and state governments and officials throughout the United States, have a compelling interest in legal issues

that affect state and local governments. This case presents just such an issue. Which overtime pay requirements are applicable to emergency medical service personnel is a question that affects thousands of state and local governments. *Amici*'s members provide emergency medical services in their jurisdictions and have a manifest interest in the cost and the structure of those services. *Amici* accordingly submit this brief to assist the Court in determining whether to grant certiorari.*

ARGUMENT

1. Section 7(k) of the FLSA provides state and local governments a partial exemption from the requirement that employers pay overtime pay at the rate of one and one-half times the regular rate of pay for all hours worked in excess of forty per week for employees in fire protection and law enforcement activities. 29 U.S.C. § 207(k). The Department of Labor ("DOL") has issued regulations explicitly stating that ambulance and rescue service employees can be considered employees in fire protection or law enforcement activities and defining the standards for determining whether they so qualify. See 29 C.F.R. §§ 553.210, 553.211, 553.215 (1993). In recent years, however, ambulance and rescue service employees have been filing lawsuits around the country claiming that they do not fall within the Section 7(k) exemption and that they are entitled to overtime pay for all hours worked in excess of forty hours per week. *See, e.g., Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993), cert. denied, 115 S. Ct. 65 (1994); *Justice v. Metropolitan Government*, 4 F.3d 1387 (6th Cir. 1993); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991); *Alexander v. Kansas City*, 1993 WL 393013 (D. Kan. Sept. 23, 1993); *Burgess v. Catawba County*, 805 F. Supp. 341 (W.D. N.C. 1992); *Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp. 194 (D. Md. 1992); *Little-*

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* The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent, pursuant to Rule 37 of the Rules of this Court, have been filed with the Clerk of the Court.

field v. Town of Old Orchard Beach, 780 F. Supp. 64 (D. Me. 1992). Many of the courts that have considered the issue have interpreted the DOL regulations very narrowly, thus excluding all or almost all ambulance and rescue service employees of state and local governments from the Section 7(k) partial exemption to general FLSA overtime requirements.

This crabbed construction is contrary to what DOL intended. It also has dire financial and operational consequences for state and local governments nationwide. Like firefighters and police officers, emergency medical service personnel are needed to cover medical emergencies that occur at all hours of the day and night. Organizing emergency medical service employees so that they work only forty hours per week will be costly, disruptive, and intrusive. Many governments will have to hire, train, and pay additional employees to do so. Alternatively, governments will have to pay their emergency medical service employees more in the future. Either choice will be costly. And either way, governments will face the possibility of huge back pay awards to those emergency medical service employees whom they have been treating as employees in fire protection or law enforcement activities in reliance on the DOL regulations. The cost and risk of litigation is pressuring governments to restructure their emergency services now, even in those circuits where there is no binding ruling. In short, this issue has done all the percolating that state and local governments can afford. This Court should grant certiorari to relieve state and local governments from this pressure—and the costs of restructuring and back pay—at a time when governments are already financially pressed.

2. As the Seventh Circuit explained, Pet. App. 10a, the question presented in this case has divided the circuits. The issue simply, is whether Sections 553.210 and 553.211 of the DOL regulations state a distinct test applicable to ambulance and rescue service employees who are employed by an organized fire or police department, or whether the test applicable to them is the one set out in

Section 553.215 of the regulations. This difference is important because Sections 553.210 and 553.211 allow employees who are an integral part of the agency's fire protection or law enforcement activities to fall within the exemption, whereas Section 553.215 requires that the work of employees be substantially related to fire fighting or law enforcement. Sections 553.210 and 553.211 explicitly apply to employees employed by an organized fire or police department, and use an "integral part" standard. On this basis, two courts have rejected application of the test under Section 553.215 to employees of a fire or police department. See *Wouters*, 9 F.3d at 931 ("integral part test presents an inquiry distinct from the substantially related standard"); *Alexander v. Kansas City*, 1993 WL 393013, at *6 (D. Kan. Sept. 23, 1993) ("integral part means something other than apply the two-part test of § 553.215 that is cross-referenced in § 553.210"). At least two courts, however, including the court below, concluded that DOL regulations state only one test that applies to all publicly employed paramedics. See Pet. App. 10a; *Justice v. Metropolitan Government*, 4 F.3d 1387, 1395 (6th Cir. 1993). This Court should resolve this conflict.

3. The Seventh Circuit's decision is also incorrect. The court below reached the conclusion that the "substantially related" test set out in Section 553.215 of the DOL regulations applies to all ambulance and rescue service employees of any public agency only by ignoring the plain language of that section. Section 553.215 states in the clearest language that it applies to "[a]mbulance and rescue service employees of a public agency other than a fire protection or law enforcement agency." 29 C.F.R. § 553.215. Rather than adhere to this language, the court below put great weight on a simple cross reference to Section 553.215 that appears at the end of Sections 553.210 and 553.211 of the regulations. On the basis of this bare cross reference, the court applied the Section 553.215 test for ambulance and rescue service employees of a public agency other than a fire protection or law en-

forcement agency to ambulance and rescue service employees who are employees of fire protection or law enforcement agencies.

Under the Seventh Circuit's construction of the regulations, parts of three sections become completely superfluous. The "integral part" language of Sections 553.210 and 553.211 applies to no one and has no meaning. And the language in Section 553.215 that says that the section applies to employees of public agencies other than fire protection and law enforcement agencies becomes mere surplusage. Indeed, the language in these three regulations that becomes the most meaningful is the bare statement "[s]ee § 553.215" that appears at the end of Sections 553.210 and 553.211. This construction makes no sense. DOL drafted language that has a plain meaning. The regulations should not be interpreted to make that language superfluous.

The City of Chicago also correctly points out in its petition that DOL regulations set out three categories of ambulance and rescue service employees in an ascending order of what the employer must show—from the easiest showing to the hardest—before its employees fall within the Section 7(k) exemption. If the employees are employed within an organized fire or police department, the employer need only show that they are an "integral part" of the department's fire protection or law enforcement activities. 29 C.F.R. §§ 553.210, 553.211. If the employees are employed by a public agency other than an organized fire or police department, the employer must show that their services are "substantially related to firefighting or law enforcement activities." 29 C.F.R. § 553.215(a). Finally, if the employees are employed by a private agency, the employer can never show they are within the Section 7(k) exemption "even if their activities are substantially related to the fire protection or law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services." 29 C.F.R. § 553.215(c). This was a completely logical approach for the regulations. It should be easier for a

public employer to treat its ambulance and rescue service employees as employees in fire protection or law enforcement activities when they work along side firefighters or police officers in fire departments or police departments. In such circumstances, there is virtually no chance that the organizational structure is pretextual; thus there is no reason for a test that is difficult to satisfy. Indeed, there is every reason to think that ambulance and rescue service employees actually in fire and police departments should be every bit as exempt under Section 7(k) as firefighters and police officers themselves. The court below thus erred when it interpreted the regulations to mean that paramedics employed by a fire department had to meet the same test that the regulations apply for paramedics who are not employed by a fire or police department.

4. The disarray in the lower courts on the question presented in this case has not been aided by the failure of DOL to speak to that question. Although the lower courts have reached conflicting conclusions, DOL has studiously refrained from bringing or intervening in litigation on this point, or otherwise clearly articulating its position on this critical issue. Accordingly, the need for guidance from this Court (or, at the minimum, the need for the views of the Solicitor General on this important question) is all the greater.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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